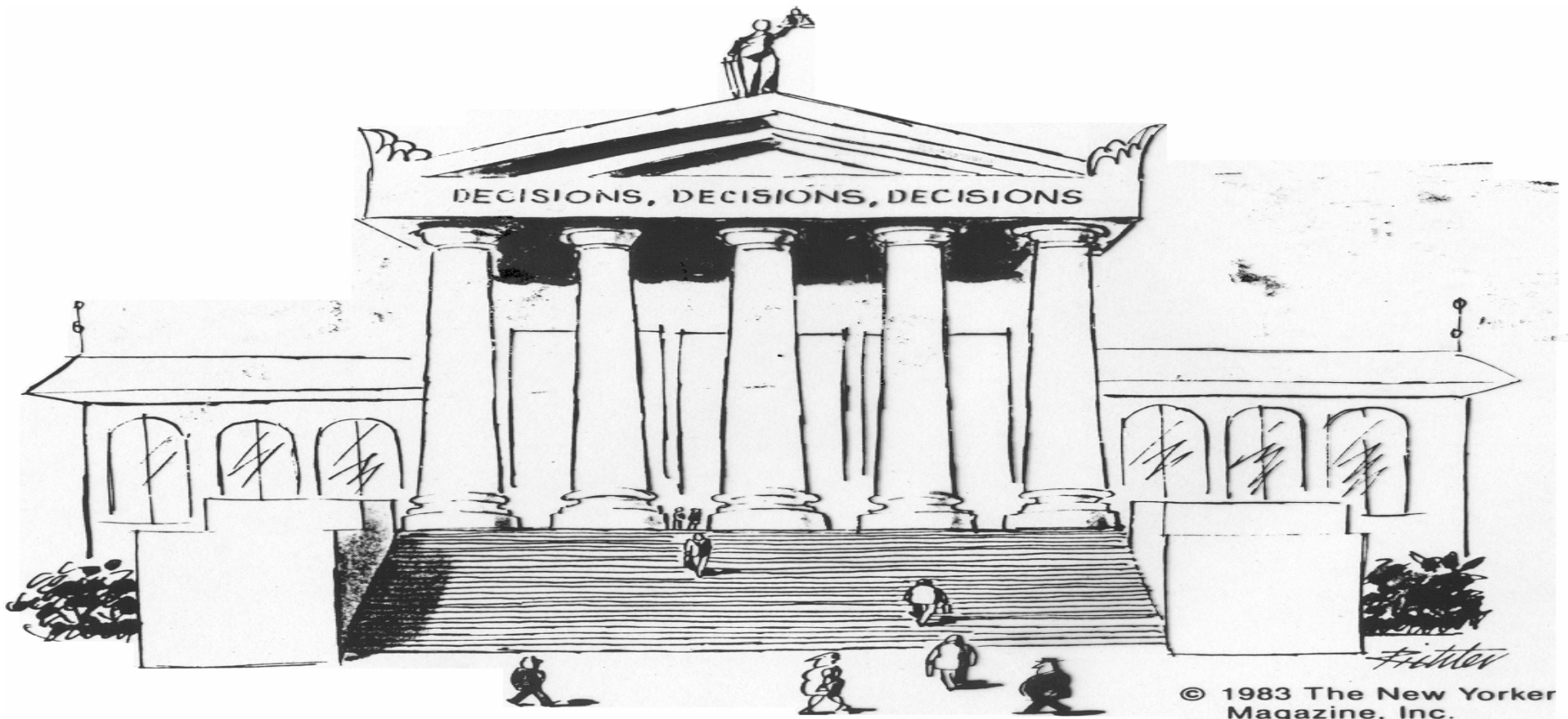


Constitutional Issues in Drug and other Problem-Solving Courts



© 1983 The New Yorker Magazine, Inc.

Judge William G. Meyer (ret.)
Sr. Fellow Nat. Drug Ct. Institute
Judicial Arbiter Group, Inc.
1601 Blake Street, Suite 400
Denver, Colorado 80202

Give me the info, please!

- `bmeyer@jaginc.com`

FIRST AMENDMENT

- Working the twelve steps requires:
 - **Confess to God “the nature of our wrongs” (Step 5);**
 - **Appeal to God to “remove our short comings” (Step 7);**
 - **By “prayer and meditation” to make “contact” with God to achieve the “knowledge of his will” (Step 11).**

FIRST AMENDMENT

- “Congress shall make no law respecting an establishment of religion or prohibiting the full exercise thereof . . .” U.S. Constitution Amendment I applied to the states by the XIV Amendment of the U.S. Constitution. See also *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

FIRST AMENDMENT

- *Kerr v. Ferry*, 95 F.3d 472, 479-80 (7th Cir. 1996) (prison violated Establishment Clause by requiring attendance at Narcotics Anonymous meetings which used “God” in its treatment approach);
- *Griffin v. Coughlin*, 88 N.Y. 2d 674 (1996) cert. denied 519 U.S. 1054 (1997) (conditioning desirable privilege – family visitation – on prisoner’s participation in program that incorporated Alcoholics Anonymous doctrine was unconstitutional as violation of the Establishment Clause);

Not all is lost

- *O'Conner v. California*, 855 F. Supp. 303, 308 (C. D. Calif.) (no Establishment Clause violation where DUI probationer had choice over program, including self-help programs that are not premised on monotheistic deity)
- *In Re Restraint of Garcia*, 24 P.3d 1091 (Wash. App. 2001) (same)

First Amendment and Area Restrictions

- Who uses place and area restrictions?

Reasonable when narrowly drawn:

- 1) **Whether the defendant has a compelling need to go through/to the area;**
- 2) **A mechanism for supervised entry into the area;**
- 3) **The geographic size of the area restricted, and**
- 4) **The relatedness between the restriction and the rehabilitation needs of the offender.**

See People v. Rizzo, 362 Ill. App. 3d 444 (2005).

Association Restrictions

- Watch who you hang out with
- Not necessarily know that they are druggies or felons, look at what associates are doing and where they are

Jones v. State, 41 P.3d 1247 (Wyo. 2001) (persons of disreputable character); *State v. Hearn*, ____ P.3d ____ (Wash. App. 2/6/06) (prohibition against associating with drug users or dealers constitutional); *Birzon v. King*, 469 F.2d 1241, 1242 (2nd. Cir. 1972); *Commonwealth v. LaPointe*, 759 N.E.2d 294 (Mass. 2001).

FOURTH AMENDMENT AND RELATED ISSUES

- Probation and parolees---Not probable cause but reasonable suspicion
- Why?
- Reduced expectation of privacy and special need to control recidivism

Griffin v. Wisconsin, 483 U.S. 868 (1987); *U.S. v. Knights*, 534 U.S. 112 (2001).

FOURTH AMENDMENT AND RELATED ISSUES—Alcohol Prohibition

- . . Empirical evidence shows that there is a nexus between drug use and alcohol consumption. It is well documented that the use of alcohol lessens self-control and thus may create a situation where the user has reduced ability to stay away from drugs.

People v. Beal, 60 Ca. App. 4th 84 (Calif. App. 1997).

What about execution of search waiver?

U.S. v. Knights, 534 U.S. 112 (2001).

State v. McAuliffe, 125 P.3d 276 (Wyo. 2005) (probation conditions re: search waiver justified contact and subsequent search, because same was conducted reasonably)

State v. Kouba, 709 N.W. 2d 299 (Minn. App. 2006) (recognizing that a waiver is sufficient in probation case); *State ex rel ACC*, 44 P.3d 708 (Utah 2002) (recognizing waiver in juvenile case but limited case to the facts)

Sampson v. California,
____ U.S. ____, 126 S.Ct. 2193 (6/19/06)

- In parole case, mandatory search waiver constitutional and totally suspicionless search is upheld.
- Like *Knights*, but goes further because does not make a finding of reasonableness, but notes cannot be harassment

Search waivers in non-convicted cases

- Compare *State v. Ullring*, 741 A.2d 1065 (Me. 1999) (search waiver as condition of bond constitutional); and *In Re York*, 9 Cal. 4th 1133 (Calif. 1995) (same) **with**
- *Terry v. Superior Court*, 73 Cal. App. 4th 661 (Cal. App. 1999) (4th Amendment waiver improper condition in diversion case, without statutory authority) and *U.S. v. Scott*, 424 F.3d 888 (9th Cir. 2005) (search waiver probably improper when person on bond).

Random Drug and Alcohol Testing

- Distinction between convicted vs. non-convicted status----
as a condition of bond or pre-trial release
must be reasonable and based upon
individual assessment

Steiner v. State, 763 N.E. 2d 1024 (Ind. App. 2002); *Oliver v. U.S.*, 682 A.2d 186, 192 (D.. 1996); *State v. Ullring*, 741 A.2d 1045 (Me.1999)

Due Process

- Procedural protections are due under the due process clause when the defendant will potentially suffer a loss to a recognized liberty or property right under the 14th Amendment.
- If due process applies, the question remains what process is due.

Fuentes v. Shevin, 407 U.S. 67 (1972).

Morrissey v. Brewer, 408 U.S. 471 (1972).

Due Process

- Stipulated fact trial—use of police report
- Although the full *Boykin v. Alabama*, 395 U.S. 238 (1969) inquiry are not necessary to implement waivers to a stipulated fact trial, a showing of a knowing, voluntary and intelligent waiver must be present)
- *State v. Melick*, ____ P.3d ____ (Wash. 2006). (see also case cited therein); *Adams v. Peterson*, 968 F.2d 835 (9th Cir. 1992)

Due Process

- What is required?
- P/C determination
- Written Notice
- Right to Appear
- Cross-Exam and call witnesses
- Independent magistrate
- Written findings-reasons

Gagnon v. Scarpelli, 411 U.S. 778, 781-782 (1973). (probation)

Due Process

- What about right to counsel?

Due Process

- Hearsay Admissible—but only reliable hearsay
- 1. Whether a hearsay report by the was corroborated.
- 2. The reliability of the source of the information and, if by unnamed informants, the reason for identity non-disclosure.
- 3. The provision of a hearing with opportunity to fully cross-examine adverse witness.
- 4. Whether a preponderance of the evidence supported termination.
- 5. The disparity of the sentence upon completion and non-completion

Due Process

- Revocation=Termination

People v. Anderson, 833 N.E.2d 390 (Ill. App. 2005); *State v. Cassill-Skilton*, 122 Wash. App. 652 (Wash. App. 2004); *Hagar v. State*, 990 P.2d 894 (Ok. 1999).

But see *STATE v. ROGERS*, 31264 (Idaho Ct. App. 8/22/2006)

Due process concerns are therefore sufficiently allayed through the contract-based means commonly used to remedy breaches of agreements between the State and a defendant. By this opinion we do not wish to dissuade a judge from following termination procedures in drug court akin to those employed in a probation revocation process. To the contrary, in order to eliminate uncertainty and the appearance of unfairness, we encourage courts to do so. What is recommended is not, however, the equivalent of what is required.

Drug testing and Due Process

- Urine
 - instrumented
 - immunoassay
 - thin layer chromatography
 - GC/MS
 - non-instrumented
 - cups
 - sticks

Drug testing and Due Process

- Hair
- Patch
- SCRAM
- Saliva

Due Process & Judicial Impartiality

- Test:

U.S. v. Ayala, 289 F.3d 16, 27 (1st Cir. 2002) (would the facts, as asserted, lead an objective reasonable observer to question the judge's impartiality)

Due Process & Judicial Impartiality

- a judge should recuse where the Court has personal knowledge of disputed facts.
- the basis of recusal is due to partiality or bias acquired outside the context of the proceedings – or from an “extrajudicial source”.

Liteky v. U.S., 510 U.S. 540, 555 (1994);

- Compare *U.S. v. Bailey*, 175 F.3d 966, 969 (11th Cir. 1999) (where judge received facts from judicial source, recusal not required) with *Edgar v. K.L.*, 93 F.3d 256, 259 (7th Cir. 1996) (judge who received off the record briefings had extra judicial personal knowledge of facts).

Alexander v. State, 48 P. 3d 110 (Okla. 2002)

- Requiring the District Court to act as Drug Court team member, evaluator, monitor and final adjudicator in a termination proceeding could compromise the impartiality of a district court judge assigned the responsibility of administering a Drug Court participant's program.
- Therefore, in the future, if an application to terminate a Drug Court participant is filed, and the defendant objects to the Drug Court team judge hearing the matter by filing a Motion to Recuse, the defendant's application for recusal should be granted

Due Process and Sanctions

- Hearing vs. non hearing

Gagnon v. Scarpelli, 411 U.S. 778, 781-782 (1973); *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) overruled on other grounds *Sandlin v. Conner*, 515 U.S. 472 (1995).

Equal protection

- Discretionary entry or exclusion

Suspect class or fundamental right-strict scrutiny

Semi-suspect class / liberty interest-intermediate scrutiny

No suspect class--rational relationship to legitimate governmental interest

- *State v. Harner* , 103 P. 3d 738 (Wash. 2005)
- *In Re Miguel*, 63 P.3d 1065, 1074 (Ariz. App. 2003).
- *Lomont v. State*, 852 N.E.2d 1002 (Ind. App. 2006)

- The end